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No. 82-611

In the Supreme Court of the United States

OCTOBER TERM, 1982

RAYMOND J. DONOVAN,
SECRETARY OF LABOR, APPELLANT

v.

DOROTHY BLITZ

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY MEMORANDUM FOR THE APPELLANT

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TABLE OF AUTHORITIES

Page

Cases:

Bingham v. *Yingling Chevrolet Co.*, 297 F. 2d 341 2

Brownlow v. *Schwartz*, 261 U.S. 216 3

CETA Workers' Organizing Committee v. *City of New York*, 617 F. 2d 926 7

Combined Metals Reduction Co., In re, 557 F. 2d 179 2

Cover v. *Schwartz*, 133 F. 2d 541, cert. denied, 319 U.S. 748 2

Curtis v. *Taylor*, 625 F. 2d 645 2

Dennis v. *United States*, 341 U.S. 494 6

DeFunis v. *Odegaard*, 416 U.S. 312 3

Great Western Sugar Co. v. *Nelson*, 442 U.S. 92 3

Hark v. *Dragon*, 611 F. 2d 11, aff'g 477 F. Supp. 308 7

Holtzman v. *Schlesinger*, 414 U.S. 1304 4

Local 102, International Ladies' Garment Workers' Union v. *United States*, 439 U.S. 1070 5

Maloney v. *Sheehan*, 453 F. Supp. 1131 7

Marshall v. *Barlow's Inc.*, 429 U.S. 1347 4

New Left Education Project v. *Board of Regents*, 414 U.S. 807, vacating 472 F. 2d 218 ..... 3, 4

Page

Cases—Continued:

Ringsby Truck Lines, Inc. v. *Western Conference of Teamsters*, 686 F. 2d 720 2

Scales v. *United States*, 367 U.S. 203 6

Taylor v. *United States*, 410 F. 2d 392 2

Velsicol Chemical Corp. v. *United States*, 435 U.S. 942 5

Yates v. *United States*, 354 U.S. 298 5-6

Statutes:

Job Training Partnership Act, Pub. L. No. 97-300, 96 Stat. 1354 1

Section 181(a) 1

28 U.S.C. 1252 5

Pub. L. No. 97-377 (Dec. 21, 1982) 1

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1. Appellee agrees that this case is moot because she has completed the job training program to which she sought admission and therefore has received "all the relief she sought." Mot. to Dis. 1, 7-8.[1] Appellee contends only that

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[1]In particular, appellee specifically does not contend that her enrollment in a job training program in New York prevents this case from being moot. See Mot. to Dis. 10-11 & n.6.

For essentially the reasons stated by appellee (Mot. to Dis. 5-6 & n.2), we agree that the expiration of the Comprehensive Employment and Training Act (CETA) is not an independent ground for finding this case moot. The Job Training Partnership Act, Pub. L. No. 97-300, 96 Stat. 1354, establishes a program that is similar to CETA in some respects. The Daniel Amendment was continued in effect by Pub. L. No. 97-377, enacted December 21, 1982, and because of Section 181(a) of the Job Training Partnership Act, the restriction imposed by the Daniel Amendment applies to funds spent under that Act.

We note also that this case appears to have become moot after an appeal was taken to this Court. Compare J.S. 8 n.5 with J.S. App. 14a.

the Court should dismiss the appeal instead of vacating the judgment of the district court and remanding the case with instructions to dismiss the complaint as moot.

This case became moot because the Secretary complied with the district court's injunction — which required him "immediately [to] undertake all appropriate steps to insure that [appellee's] application for employment training * * * is processed without regard to" the Daniel Amendment (J.S. App. 13a) — and ordered appellee admitted to the CETA program. Appellee cites no case that became moot for this reason in which an appellate court dismissed the appeal. Appellee relies principally on *Cover* v. *Schwartz*, 133 F.2d 541, 543-547 (2d Cir.), cert. denied, 319 U.S. 748 (1943), and *Ringsby Truck Lines, Inc.* v. *Western Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982). But in neither of these cases did the cause become moot because the defendant complied with an injunction. In both cases, the appellant simply "abandoned [his] contention" on appeal (133 F.2d at 544) — in *Cover* apparently for tactical reasons, and in *Ringsby* because the case was settled by an agreement between the parties that provided for the appeal to be dismissed and did not require the vacation of the district court's order (see 686 F.2d at 721-722).[2]

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[2]Of the other cases cited by appellee (Mot. to Dis. 10 n.4), in *Curtis* v. *Taylor*, 625 F.2d 645, 648 (5th Cir. 1980), *Taylor* v. *United States*, 410 F.2d 392 (5th Cir. 1969), and *Bingham* v. *Yingling Chevrolet Co.*, 297 F.2d 341 (10th Cir. 1961), the appellant took an action that mooted the appeal even though the district court's order apparently did not require him to do so before the appeal was decided. See, *e.g.*, 625 F.2d at 648 (appellant "could have waited until this court had determined the merits of the appeal before" complying with district court's order); 297 F.2d at 342 ("[P]ayment [by appellant of a debt he unsuccessfully attempted to have discharged in district court] was made voluntarily and was accepted. * * * [N]either [appellant] nor any one else is trying to get the money back.") By contrast, the district court's order in this case required the Secretary "immediately" to ensure appellee's admission to the CETA program (J.S. App. 13a). In *In Re Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977), the district court's decision left the *appellee* free to act in a way that made the case moot, and the appellant did not prevent the appellee from so acting.

By contrast, in *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974), and *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92 (1979), defendants acted as the Secretary did here — they complied with the lower court's orders, as they were required to do, pending further review. This Court, upon determining in each case that the cause was moot because the plaintiff had received all the relief he requested, ordered the judgment of the lower court vacated. See 416 U.S. at 320; 442 U.S. at 94. As we explained (J.S. 8-9), some Justices dissented, for reasons that are inapplicable here, from the holding that *DeFunis* was moot; but none questioned the premise that if the case was moot, the proper disposition was to vacate the lower court's judgment, not simply to dismiss the petition. None urged that the party seeking review, by complying with the lower court's decision, had somehow forfeited his right to have that decision reviewed and, if appropriate, vacated as moot.

Indeed, this Court appears to have considered and rejected an argument similar to appellee's in *Brownlow* v. *Schwartz*, 261 U.S. 216 (1923). That case became moot because the appellant, a government official, complied with the lower court's order, while appealing it, even though he was not required to do so. The Court nonetheless did not dismiss the writ of error but "reversed" and ordered the case dismissed. *Id.* at 218-219. The Court explained (*id.* at 218): "It is urged that the [appellant acted] only because he believed it was incumbent upon him to comply with the judgment of the Court of Appeals and avoid even the appearance of disobeying it. The motive of the officer, so far as this question is concerned, is quite immaterial. We are interested only in the indisputable fact that his action, however induced, has left nothing to litigate." In addition, as appellee acknowledges (Mot. to Dis. 9 n.3), in *New Left Education Project* v. *Board of Regents*, 472 F.2d 218 (5th Cir. 1973), the court of appeals followed a course similar to

that advocated by appellee here — although again in a case in which the defendant complied voluntarily with the district court's order and was under no compulsion to do so —and this Court summarily overturned the court of appeals' decision. 414 U.S. 807 (1973).[3] In this case, moreover, the Secretary complied with the district court's order not voluntarily but because he would have been in contempt had he not done so.

As appellee recognizes, the only alternative to the course the Secretary pursued here would have been to seek a stay of the district court's decision. Indeed, appellee appears to concede that the disposition we request would be appropriate if the Secretary had sought a stay. See Mot. to Dis. 13. But often, as in this case, the "equitable balance between the parties" (*Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1309 (1973) (Marshall, Circuit Justice)) will not warrant an application for a stay, even if the case will become moot in the absence of a stay; that is because the harm to the government's interests that results from exempting a single party from the requirements of a federal statute pending further review can be quite limited. Cf. *Marshall* v. *Barlow's, Inc.*, 429 U.S. 1347 (1977) (Rehnquist, Circuit Justice). If we had sought a stay in this case, appellee presumably would have opposed it on precisely that ground. In general, it is obviously not in the interest of any party, or of the Court, to require an appellant or petitioner to file an unwarranted stay application in a case destined to become

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[3]Appellee attempts to explain *New Left Education Project* by suggesting that the Court was "influenced by considerations of federalism since the district court's order had the effect of enjoining a state court proceeding over the same subject matter" (Mot. to Dis. 9 n.3). Because the district court in this case declared unconstitutional an Act of Congress, considerations at least as substantial militate against allowing the judgment below to stand unreviewed.

moot (or in every case that might possibly become moot) solely in order to preserve his right to have the lower court's judgment vacated.[4]

2. Appellee does not deny that if the Daniel Amendment were interpreted in the way specified by the Secretary, it would be constitutional. Instead, she insists (*e.g.*, Mot. to Dis. 15) that the Secretary lacks authority to interpret the Amendment in this way. But the remarks of members of Congress cited by appellee (*ibid.*) shed no light on how Congress intended to define the phrase "publicly advocate the violent overthrow of the Federal Government"; by contrast, as we noted (J.S. 10), Senator Warner — who introduced the Amendment in the Senate, and whom appellee acknowledges as a leading proponent of the Amendment (Mot. to Dis. 4-5) — specifically referred to "a series of court decisions which pretty well characterize those remarks which would be considered advocating the violent overthrow of the U.S. Government." Similarly, Congress cannot be taken to have prejudged appellee's specific case merely because general facts about her were mentioned during congressional debates (Mot. to Dis. 3-5, 16).

Appellee also invokes the language of the Daniel Amendment (Mot. to Dis. 16-17), but she does not discuss such decisions as *Yates* v. *United States*, 354 U.S. 298, 319

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[4]Appellee cites our Briefs in Opposition in *Velsicol Chemical Corp.* v. *United States*, 435 U.S. 942 (1978) (No. 77-990, 1977 Term), and *Local 102, International Ladies' Garment Workers' Union* v. *United States*, 439 U.S. 1070 (1979) (No. 78-633, 1978 Term). Our argument in those cases, however, relied on the fact that the party seeking review was invoking only this Court's discretionary jurisdiction and did not have a right to obtain review. See 77-990 Br. in Opp. 5 & n.4; 78-633 Br. in Opp. 4 n.4. In this case, we have invoked the Court's mandatory jurisdiction under 28 U.S.C. 1252, and appellee does not deny that the Court has jurisdiction under that provision. In any event, because the district court declared an Act of Congress unconstitutional, and our arguments in defense of that statute are plainly substantial, the Court would undoubtedly have granted plenary review if the case were not moot.

(1957), *Dennis* v. *United States*, 341 U.S. 494, 499-502 (1951) (plurality opinion), and *Scales* v. *United States*, 367 U.S. 203, 221-222, 228-230 (1961), in which the Court ruled (see J.S. 10) that the term "advocate" is not to be construed as having its "ordinary dictionary meaning" but "carr[ies] a special and limited connotation" that conforms to constitutional requirements (*Yates* v. *United States*, *supra*, 354 U.S. at 319).

3. Appellee appears to contend (*e.g.*, Mot. to Dis. 22) that she should be excused from the requirement of exhausting administrative remedies because the Secretary did not anticipate her complaint and announce his construction of the Daniel Amendment before she brought suit, and because she wrote a letter to him asking for relief one week before she sued. But as we explained (J.S. 2-3), Congress established, under CETA, a grievance procedure that contemplated a hearing before the prime sponsor followed by an investigation by the Secretary and, if appropriate, a hearing before the Secretary. Appellee does not contend that she invoked these remedies, and she points to no statute or regulation requiring the Secretary to issue interpretations of disputed provisions of CETA before they are brought before him in a specific controversy according to the procedures specified in the Act. Nor does appellee cite any statute or regulation requiring the Secretary promptly to answer requests for relief that bypass the remedies established by Congress. By the same token, appellee's assertion (Mot. to Dis. 21) that "exhaustion should not have been required because it would have been futile" in light of "a statute as clear and precise as" the Daniel Amendment is belied by appellee's attempt (Mot. to Dis. 7) to persuade the

Secretary, albeit without resort to the established administrative procedure, to direct the VEC to process appellee's CETA application.[5]

For these reasons and the reasons stated in the jurisdictional statement, it is respectfully submitted that the judgment of the district court should be vacated and the case remanded with instructions to dismiss the complaint as moot.[6] If the Court determines that the case is not moot, probable jurisdiction should be noted.

REX E. LEE
Solicitor General

JANUARY 1983

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[5]Appellee cites (Mot. to Dis. 21) three cases which, she asserts, hold that the administrative remedies prescribed by CETA need not be exhausted. But in one of those cases, *CETA Workers' Organizing Committee* v. *City of New York*, 617 F.2d 926 (1980), the Second Circuit specifically held that exhaustion *was* required (*id.* at 935-936), and noted (*id.* at 934 n.6) that its earlier decision in *Hark* v. *Dragon*, 611 F.2d 11, aff'g 477 F. Supp. 308 (D. Vt. 1979), which appellee also cites, did not consider the exhaustion issue. In *Maloney* v. *Sheehan*, 453 F.Supp. 1131 (D. Conn. 1978), it appears that the failure to exhaust administrative remedies was not raised as a defense. See *id.* at 1136-1137.

[6]We do not intend to suggest that the district court would lack the power to act on appellee's application for attorney's fees.